TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1955

No. 71

LONNIE AFFRONTI, PETITIONER,

vs.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITION FOR CERTIORARI FILED MAY 12, 1955.

CERTIORARI GRANTED JUNE 6, 1955

SUPREME COURT OF THE UNITED STATES

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LONNIE AFFRONTI, PETITIONER,

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., JULY 13, 1955

—2940-5

[fol. 1] Record entry of return of indictment (omitted in printing).

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI

No. 11266

UNITED STATES OF AMERICA, Plaintiff,

vs.

LONNIE AFFRONTI, Alias Lonnie Affrontia, Alias Lonnie A'Fronte, Defendant

INDICTMENT—Filed January 21, 1932

The grand jurors of the United States of America, duly and legally chosen, selected, summoned and drawn from the body of the Western District of Missouri, and duly and legally empaneled, sworn and charged to inquire of and concerning crimes and offenses against the United States of America in the Western District of Missouri, upon their oaths present and charge that one Lonnie Affronti, alias Lonnie Affrontia, alias Lonnie A'Fronte, whose name other than herein set forth is to the grand jury unknown, did on the 18th day of June 1931, at 9th and Locust Streets, Kansas City, Jackson County, Missouri, in the Western Division of the Western District of Missouri, unlawfully, wilfully, knowingly and feloniously sell two hundred and thirty grains of morphine, a derivative of opium, not from [fol. 2] the original stamped package and not in the original stamped package, and upon which the tax had not been paid as was required by law;

Contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States of America.

Count II

And the grand jurors aforesaid, upon their oaths aforesaid, do further present and charge that one Lonnie Affronti, alias Lonnie Affrontia, alias Lonnie A'Fronte, whose name other than as herein set forth is to the grand

jury unknown, did on the 20th day of October, 1931, at and near Gladstone Boulevard and Windsor Avenue, Kansas City, Jackson County, Missouri, in the Western Division of the Western District of Missouri, unlawfully, wilfully, knowingly and feloniously sell One Hundred and nineteen grains of morphine, a derivative of opium not from the original stamped package and not in the original stamped package and upon which the tax had not been paid as was required by law;

Contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States of America.

Count III

And the grand jurors aforesaid, upon their oaths aforesaid, do further present and charge that one Lonnie Affronti, alias Lonnie Affrontia, alias Lonnie A'Fronte, whose name other than as herein set forth is to the grand jury unknown, did on the 28th day of October, 1931, at and near Gladstone Boulevard and Windsor Avenue, Kansas City, Jackson County, Missouri, in the Western Division of the Western District of Missouri, unlawfully, wilfully, knowingly and feloniously sell one hundred twenty one grains of morphine, a derivative of opium not from the original stamped package and not in the original stamped package and upon which the tax had not been paid as was required by law;

[fol. 3] Contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States of America.

Count IV

And the grand jurors aforesaid, upon their oaths aforesaid, do further present and charge that one Lonnie Affronti, alias Lonnie Affrontia, alias Lonnie A'Fronte, whose name other than as herein set forth is to the grand jury unknown, did on the 4th day of November, 1931, at and near Gladstone Boulevard and Windsor Avenue, Kansas City, Jackson County, Missouri, in the Western Division of the Western District of Missouri, unlawfully, wilfully, knowingly and feloniously sell one hundred fourteen grains of morphine, a derivative of opium not from the

original stamped package and not in the original stamped package and upon which the tax had not been paid as was required by law;

Contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States of America.

Count V

And the grand jurors aforesaid, upon their oaths aforesaid, do further present and charge that one Lonnie Affronti, alias Lonnie Affrontia, alias A'Fronte whose name other than as herein set forth is to the Grand jury unknown, did on the 11th day of November, 1931, at and near Gladstone Boulevard and Windsor Avenue, Kansas City, Jackson County, Missouri, in the Western Division of the Western District of Missouri, unlawfully, wilfully, knowingly and feloniously sell ninety two grains of morphine, a derivative of opium not from the original stamped package and not in the original stamped package and upon which the tax had not been paid as was required by law;

Contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States of America.

[fol. 4]

Count VI

And the grand jurors aforesaid, upon their oaths aforesaid, do further present and charge that one Lonnie Affronti, alias Lonnie Affrontia, alias Lonnie A'Fronte, whose name other than as herein set forth is to the grand jury unknown, did on the 17th day of November, 1931, at and near Gladstone Boulevard and Windsor Avenue, Kansas City, Jackson County, Missouri, in the Western Division of the Western District of Missouri, unlawfully, wilfully, knowingly and feloniously sell eighty five grains of morphine, a derivative of opium not from the original stamped package and not in the original stamped package and upon which the tax had not been paid as was required by law;

Contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States of America.

Count VII

And the grand jurors aforesaid, upon their oaths aforesaid, do further present and charge that one Lonnie Affronti, [alise] Lonnie Affrontia, alias Lonnie A. A'Fronte, whose name other than as herein set forth is to the grand jury unknown, did on the 1st day of December, 1931, at Independence and Lydia Avenues, Kansas City, Jackson County, Missouri, in the Western Division of the Western District of Missouri, unlawfully, wilfully, knowingly and feloniously sell one hundred forty two grains of morphine, a derivative of opium not from the original stamped package and not in the original stamped package and upon which the tax had not been paid as was required by law;

Contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States of America.

Count VIII

And the grand jurors aforesaid, upon their oaths aforesaid, do further present and charge that one Lonnie Affronti, alias Lonnie Affrontia, alias Lonnie A'Fronte, [fol. 5] whose name other than as herein set forth is to the grand jury unknown, did on the 10th day of December, 1931, at Independence and Lydia Avenues, Kansas City, Jackson County, Missouri, in the Western Division of the Western District of Missouri, unlawfully, wilfully, knowingly and feloniously sell one hundred forty five grains of morphine, a derivative of opium not from the original stamped package and not in the original stamped package and upon which the tax had not been paid as was required by law;

Contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States of America.

Count IX

And the grand jurors aforesaid, upon their oaths aforesaid, do further present and charge that one Lonnie Affronti, alias Lonnie Affrontia, alias Lonnie A'Fronte, whose name other than as herein set forth is to the grand

jury unknown, did on the 18th day of December, 1931, at Independence and Lydia Avenues, Kansas City, Jackson County, Missouri, in the Western Division of the Western District of Missouri, unlawfully, wilfully, knowingly and feloniously sell two hundred and three grains of morphine, a derivative of opium not from the original stamped package and not in the original stamped package and upon which the tax had not been paid as was required by law;

Contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States of America.

Count X

And the grand jurors aforesaid, upon their oaths aforesaid, do further present and charge that one Lonnie Affronti, alias Lonnie Affrontia, alias Lonnie A'Fronte whose name other than as herein set forth is to the grand jury unknown, did on the 2nd day of January, 1932, at 1207 Troost Avenue, Kansas City, Jackson County, Missouri, in the Western Division of the Western District of Missouri, unlawfullly, wilfully, knowingly and feloniously sell two hundred and three grains of morphine, a derivative [fol. 6] of opium not from the original stamped package and not in the original stamped package and upon which the tax had not been paid as was required by law;

Contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States of America.

S. M. Carmean, Assistant United States Attorney.

A True Bill: Walter Ragland (Ragland), Foreman of the Grand Jury.

Attest: A true copy.

A. L. Arnold, Clerk By N. G. Smith, Deputy. (Seal.)

[File endorsement omitted.]

IN THE UNITED STATES DISTRICT COURT, WESTERN DISTRICT OF MISSOURI

No. 11266

UNITED STATES OF AMERICA

vs.

LONNIE AFFRONTI, Alias Lonnie Affrontia, Alias Lonnie A'Fronte

Criminal Indictment in Ten Counts for Violation of Harrison Narcotic Act

JUDGMENT AND COMMITMENT—January 26, 1944

On this 26th day of January, 1944, came the United States Attorney, and the defendant, Lonnie Affronti, alias Lonnie Affrontia, alias Lonnie A'Fronte, appearing in person, and by counsel, and

The defendant having been convicted on verdict of guilty of the offenses charged in counts two, three, four, five, six, [fol. 7] seven, eight, nine and ten of the Indictment in the above-entitled cause, to wit: unlawfully, wilfully, knowingly and feloniously sell morphine, a derivative of opium, not from the original stamped package and not in the original stamped package and upon which the tax had not been paid as required by law, and the defendant having been now asked whether he has anything to say why judgment should not be pronounced against him, and no sufficient cause to the contrary being shown or appearing to the Court, It Is By The Court

Ordered And Adjudged that the defendant, having been found guilty of said offenses, is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for the period of five (5) years on each of counts two, three, four, five, six, seven, eight, nine and ten of the Indictment; the sentence imposed on count three to begin to run at the expiration of the sentence imposed on count two; the sentence imposed on count four to begin to run at the expiration of the sentence imposed on count three; the sentence imposed on count five to begin to run at the expiration of the sentence imposed on

count four; the sentence imposed on count six to begin to run at the expiration of the sentence imposed on count five; the sentence imposed on count seven to begin to run at the expiration of the sentence imposed on count six; the sentence imposed on count eight to begin to run at the expiration of the sentence imposed on count seven; the sentence imposed on count nine to begin to run at the expiration of the sentence imposed on count eight, and the sentence imposed on count two to begin to run at the expiration or the sentence imposed on count nine; the sentence herein imposed on count two to begin to run at the expiration or termination of the sentence imposed by the Circuit Court of Ray County, Missouri, which the defendant is now serving in the Missouri State Penitentiary; the execution of the sentences imposed on counts six, seven, eight, nine and ten is suspended and the defendant is placed on probation, under the usual conditions, for the period of twenty five (25) years; the probation herein granted to begin to run at the expiration of the sentences imposed on counts two, three, four and five, or until said defendant is otherwise discharged as provided by law, without costs.

[fol. 8] It Is Further Ordered that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the same shall serve as the commitment.

J. C. Collet, United States District Judge.

The Court recommends commitment to an institution of the penal type.

Approved as to form:

Thomas A. Costolow, Assistant United States Attorney.

No. 11,266

UNITED STATES

vs.

LONNIE AFFRONTI, Alias Lonnie Affrontia, Alias Lonnie A'Fronte

RETURN

I have executed the within Judgment and Commitment as follows:

Defendant delivered on to
Defendant noted appeal on and released on
Did on)
Did not) elect to enter upon service of sentence.
Defendant's appeal determined on
Defendant surrendered on to
at , the institution designated by the Attorney General, together with certified copy of the within Judgment and Commitment.

—— ——, U. S. Marshal, By —— ——, Deputy.

[File endorsement omitted.]

[fol. 9] IN UNITED STATES DISTRICT COURT

MANDATE OF UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT—Filed November 4, 1944

UNITED STATES OF AMERICA, ss.:

The President of the United States of America,

To the Honorable Judges of the District Court of the United States for the Western District of Missouri.

(Seal.)

Greeting:

Whereas, lately in the District Court of the United States for the Western District of Missouri, before you, or some of you in a cause between the United States of America,

Plaintiff, and Lonnie Affronti, alias Lonnie Affrontia, alias Lonie A'Fronte, Defendant, No. 11266, wherein the judgment and sentence of the said District Court in said cause, entered on the 26th day of January, A. D. 1944, was in the following words, viz:

"On this 26th day of January, 1944, came the United States Attorney, and the defendant, Lonnie Affronti, alias Lonnie Affrontia, alias Lonnie A'Fronte, appearing in person, and by counsel, and

The defendant having been convicted on verdict of guilty of the offenses charged in counts, two, three, four, five, six seven, eight, nine and ten of the Indictment in the above entitled cause, to wit: unlawfully, wilfully, knowingly and feloniously sell morphine, a derivative of opium, not from the original stamped package and not in the original stamped package and upon which the tax had not been paid as required by law, and the defendant having been now asked whether he has anything to say why judgment should not be pronounced against him, and no sufficient cause to the contrary being shown or appearing to the Court, it is by the Court

Ordered and adjudged that the defendant, having been found guilty of said offenses, is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for the period of five (5) years [fol. 10] on each of counts two, three, four, five, six, seven, eight, nine and ten of the Indictment; the sentence imposed on count three to begin to run at the expiration of the sentence imposed on count two; the sentence imposed on count four to begin to run at the expiration of the sentence imposed on count three; the sentence imposed on count five to begin to run at the expiration of the sentence imposed on count four; the sentence imposed on count six to begin to run at the expiration of the sentence imposed on count five; the sentence imposed on count seven to begin to run at the expiration of the sentence imposed on count six; the sentence imposed on count eight to begin to run at the expiration of the sentence imposed on count seven; the sentence imposed on count nine to begin to run at the expiration of the sentence imposed on count eight; and the sentence imposed on count ten to begin to run at the expiration of the

sentence imposed on count nine; the sentence herein imposed on count two to begin to run at the expiration or termination of the sentence imposed by the Circuit Court of Ray County, Missouri, which the defendant is now serving in the Missouri State Penitentiary; the execution of the sentences imposed on counts six, seven, eight, nine and ten is suspended and the defendant is placed on probation, under the usual conditions, for the period of twenty-five (25) years; the probation herein granted to begin to run at the expiration of the sentences imposed on counts two, three, four and five, or until said defendant is otherwise discharged as provided by law, without costs.

It is further ordered that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the same shall serve as the Commitment.

J. C. Collett, United States District Judge."

as by the inspection of the transcript of the record of the said District Court, which was brought into the United States Circuit Court of Appeals, Eighth Circuit, by virtue of an appeal, agreeably to the act of Congress, in such case made and provided, fully and at large appears;

[fol. 11] And whereas, at the September term, in the year of our Lord one thousand nine hundred and forty-four, the said cause came on to be heard before the said United States Circuit Court of Appeals, on the transcript of the record from the District Court of the United States for the Western District of Missouri, and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court, that the judgment and sentence of the said District Court, in this cause, be, and the same is hereby, affirmed, without costs to either party in this Court.

And it is further ordered by this Court that the defendant in the said District Court, Lonnie Affronti, do surrender himself to the custody of the United States Marshal for the Western District of Missouri, if not now in custody, in execution of the judgment and sentence imposed upon him, within thirty days from and after the date of the filing of the mandate of this Court in the said District Court.

October 14, 1944.

You, therefore, are hereby commanded that such proceedings, be had in said cause, as according to right and justice, and the laws of the United States, ought to be had, the said appeal notwithstanding.

Witness, the Honorable Harlan F. Stone, Chief Justice of the United States, the 3rd day of November, in the year of our Lord one thousand nine hundred and forty-four.

E. E. Koch, Clerk of the United States Circuit Court of Appeals, Eighth Circuit.

[Endorsed:] United States Court of Appeals. No. 12817. September Term, 1944. Lonnie Affronti, Appellant, vs. United States of America. Mandate.

[File endorsement omitted.]

[fol. 12] IN THE UNITED STATES DISTRICT COURT

[Title omitted]

MOTION TO STAY EXECUTION OF SENTENCE AND MOTION TO MODIFY SENTENCE AND PLACE DEFENDANT ON PROBATION—Filed July 14, 1953

1. Comes now Lonnie Affronti and states to the Court that in 1937 he was arrested in the State of New York and there charged with carrying concealed weapon and that upon trial he was convicted and sentenced to serve a term of 7 to 14 years, which sentence was served within 5 years; that while confined in the Penitentiary in New York State he was indicted in the United States District Court in New York for possession of narcotics and, upon conviction there, received a term of 3 years; that the charges against him in connection with the carrying of concealed weapon grew out of a search which was made of the room where he was living and the weapon consisted of a revolver which was in a drawer of his dresser, and was not on his person as the charge would indicate; that said sentences in the State of New York have been fully served; that upon completion of the sentences in New York State he was released to the authorities of Ray County, Missouri and by them

brought back to the State of Missouri. He was tried in the Ray County Circuit Court charged with murder in the first degree. The verdict of the jury was guilty of murder in the second degree, for which he received a 10-year sentence, that said sentence was served in the Missouri State Penitentiary, and he was released to the custody of the United States Marshal on October 13, 1949 to start the service of the sentences received in this case.

2. Defendant states that while confined in the Missouri State Penitentiary for service of the sentence in the Ray County Circuit Court he was brought into this court under a writ of habeas corpus ad prosquendum to be tried on the indictment returned in this case, which was in 10 counts each of which charged the illegal sale of narcotics. The [fol. 13] Court directed a verdict of not guilty on the first count, and upon the remaining 9 counts defendant was found guilty. Whereupon, sentence was pronounced as follows: Defendant was sentenced to serve 5 years each on counts 2, 3, 4 and 5, said sentences to run consecutively with one another, and the service of the sentences to start upon completion of the sentence then being served in the Missouri State Penitentiary. After the service of said sentences defendant was then placed on [propation] for a period of 25 years.

3. Defendant states that the service of 5 years on Count 2 will soon have been completed, and he requests the Court to issue a stay of execution as to the remaining sentences.

4. Defendant has been in custody for a great many years. At each and every institution where he has been committed he has observed all rules and has earned good behavior time at each institution. Defendant believes that his debt to society has been paid, and assures the Court that if he is placed upon probation for the remaining sentences he will be a model citizen and will prove to the Court that the parole and probation systems are such as to assist a man in his position.

5. Defendant states that the time for his conditional release will not be reached until November 26, 1962; that if placed on probation at this time he will become gainfully employed as he has been offered employment; that the members of his family who live in Kansas City are all re-

spectable and law abiding citizens and will help and co-operate with him in every way.

6. This motion is directed to the sound discretion of the Court.

7. Defendant earnestly moves the Court to stay the execution of the remaining sentences herein and order the defendant placed on probation.

Harry F. Murphy, Attorney for Defendant Petitioner.

Copy of within motion served on United States Attorney this 14 day of July, 1952.

Harry F. Murphy.

[fol. 14] Suggestions in Support of Foregoing Motion

Rule 32, Federal Rules of Criminal Procedure:

By the terms of Rule 32(c) this Court may place defendant on probation.

[File endorsement omitted.]

In United States District Court

[Title omitted]

Memorandum and Order Overruling "Motion to Stay Execution of Sentence and Motion to Modify Sentence and Place Defendant on Probation—Filed November 18, 1954

Defendant is now confined in the Medical Center for Federal Prisoners at Springfield, Missouri, where he is serving the second of nine five-year sentences imposed to run consecutively, execution having been suspended upon the last five sentences and defendant placed on probation for twenty-five years, which sentences were imposed on the defendant in the United States District Court for the Western District of Missouri, Western Division at Kansas City, on January 26, 1944.

Defendant's motion seeks to have the unserved sentences suspended and the defendant placed on probation for the period of the unserved sentences. Defendant has spent the past seventeen years in prison; he served five years in

the State of New York under a sentence of from 7 to 14 years imposed on April 6, 1938, for carrying concealed weapons; he served a term of three years subsequent thereto, imposed on June 24, 1938, upon conviction for possession of narcotics.

Upon release, he was transferred to Missouri where he was tried and convicted and thereafter sentenced on May 22, 1943 to a period of ten years for murder in the Circuit Court of Ray County, Missouri; he was released on October [fol. 15] 14, 1949 from the Missouri State Penitentiary and transferred to Leavenworth, Kansas, to begin service of his present sentences.

In his motion the defendant contends that unless he is placed on probation for the remainder of the sentences imposed by this court, that he will not be eligible for release until November 26, 1962; further that his prison record is without blemish; that the interests of society have been served by the long period of confinement which has been imposed upon him, and that the best interests of justice will be served by placing him on probation for the remainder of the term of his sentences.

It had been the custom of this court until Phillips vs. U. S. 212 F. (2) 327 (decided May 4, 1954), in instances where, in the opinion of the court the best interests of justice would be served, to suspend the execution of a sentence, the service of which had not yet begun and place the defendant on probation for the remainder of such term, notwithstanding the fact that such defendant had begun the service of a sentence on a prior count imposed at the same term as the sentence which was later suspended.

Before the decision in Phillips vs. U. S. supra, apparently the courts in the Ninth and Tenth circuits had determined that such action was within the right of the court, but of course, the opinion in the Phillips case is binding upon this court. Kirk vs. U. S. 185 F. (2) 185 (9 Cir.); White vs. Steigleder, 37 F. (2) 858 (10 cir.).

Therefore, the defendant's Motion must be and is hereby overruled.

(Signed) R. M. Duncan, Richard M. Duncan, Chief Judge.

Dated: November 18, 1954.

[fol. 16] IN UNITED STATES DISTRICT COURT

NOTICE OF APPEAL—Filed November 19, 1954

Appellant: Lonnie Affronti, U. S. Medical Center, Springfield, Missouri.

Appellant's Attorney: Harry F. Murphy, 806 Commerce Building, Kansas City, Missouri.

Offense: Sale of Narcotics, 10 Counts: Indictment.

Defendant has filed motion to stay execution of sentence of remaining counts of judgment yet to be served and to be placed on probation. This motion was overruled November 18, 1954.

Defendant is now confined at the U. S. Medical Center, Springfield, Missouri and has yet to serve two five year sentences, service of which commence at the expiration of sentence now being served.

I, the above named appellant, hereby appeal to the United States Court of Appeals for the Eighth Circuit from the order overruling motion to suspend execution of sentence.

Dated at Kansas City, Missouri, November 18, 1954.

Lonnie Affronti, Appellant, by Harry F. Murphy, Attorney for Appellant.

Received copy of foregoing this 18th day of November, 1954.

Joseph L. Flynn, Assistant United States Attorney, Western District of Missouri.

[File endorsement omitted.]

Designation of Contents of Record—Filed November 19, 1954 (omitted in printing)

[fol. 17] [Clerk's Certificate to foregoing transcript omitted in printing.]

[fol. 18] IN UNITED STATES DISTRICT COURT

DOCKET ENTRIES

1932

April 30. Commissioner's transcript 9780.

Jan. 21. Indictment from Southwest Division filed. Order to issue capias and take $5000 bond filed.

April 30. Capias returned "non est" and filed.

May 21. Order for capias.

May 23. Order for capias, fixing bond at $5000, filed. Capias issued.

May 27. Capias with Marshal's return filed.

June 14. Order, setting aside order of May 23, forfeiting bond filed.

June 20. Petition for habeas corpus ad testificandum filed. Order for habeas corpus ad testificandum filed. Habeas corpus ad testificandum issued.

June 27. Defendant Affronti called three times but answers not. Surety called three times but answers not.

June 25. Bond of Defendant Affronti forfeited. Capias and scire facias ordered. Capias issued.

Nov. 25. Capias for Lonnie Affronti with Marshal's "non est" return filed.

1937

Oct. 18. Case dropped with leave to reinstate.

Dec. 31. Order, reinstating case filed. (As to Affronti)

1938

July 8. Case dropped with leave to reinstate.

1943

May 21. Order, reinstating case filed. Order for capias and bond, fixing bond at $10,000.00 to be taken by the nearest U. S. Commissioner, filed. Pluries capias issued and delivered to the Marshal.

[fol. 19] Aug. 23. Order for writ of habeas corpus ad prosequendum filed. Writ issued.

Sept. 7. Defendant Affronti is in court and declines counsel for purpose of arraignment. Defendant Affronti is arraigned and plea of not guilty entered. For trial October 18, 1943.

1943

Sept. 30. Writ of habeas corpus ad prosequendum returned and filed.

1944

Jan. 18. Petition and order for writ of habeas corpus ad prosequendum filed. Writ issued and delivered to the Marshal.

Jan. 24. Defendant appears with his counsel. By leave of Court defendant withdraws his plea of not guilty heretofore entered, and files demurrer to the indictment, which is taken up, considered and overruled. Defendant waives formal arraignment and enters a plea of not guilty. Both sides announce ready for trial, and jury is ordered, empanelled and sworn. Opening statements made. Government introduces testimony and rests. Defendant files motion for directed verdict as to each count; sustained as to count 1, and overruled as to counts 2 to 10, inclusive. Defendant rests. Arguments made and jury instructed and retires to consider of its verdict. Jury returns verdict of not guilty as to count 1, guilty as to counts 2 to 10, inclusive. Sentence deferred until Wednesday, January 26, 1944, at 4 o'clock P.M.

Jan. 26. Sentence: 5 years on each of counts 2 through 10 to be served consecutively, one after the other next prior; execution of the sentences on each of counts 6 through 10 suspended and defendant placed on probation for a period of 25 years to begin at the expiration of the sentences imposed on counts 2, 3, 4 and 5; without costs, [fol. 20] to run consecutively with sentence in Missouri State Penitentiary. Judgment and Commitment filed. Copies delivered to the Marshal.

Jan. 29. Notice of Appeal filed. Notice of Designation of Contents of Record on appeal filed.

Feb. 17. Application for extension of time to April 29, 1944, in which to file bill of exceptions and assignment of errors filed. Order, granting said application, filed. (Copy to Clerk, C. C. of A.)

Feb. 21. Pluries capias returned and filed. Writ of habeas corpus ad prosequendum filed.

Apr. 17. Bill of Exceptions filed.

Apr. 25. Assignment of Errors filed.

1944

Apr. 28. Transcript in appeal mailed to Clerk, U.S.C.C.A.

Nov. 4. Mandate of U.S.C.C.A. affirming judgment and sentence filed.

1949

Oct. 11. Motion of defendant to modify judgment filed. (Copy to U. S. Atty.)

Oct. 13. Order, directing the Marshal to produce defendant Affronti before this court on October 14, 1944, filed. (Copies delivered to the Marshal.)

Oct. 14. The defendant appears in open court with counsel, Mr. Otto Schmid. The motion of the defendant to modify judgment was argued, submitted to the Court, and by the Court overruled. (Judge Duncan)

Nov. 14. Judgment and Commitment, bearing Marshal's return showing defendant delivered to U. S. Penitentiary, Leavenworth, Kansas on October 14, 1949, filed.

1953

July 14. Motion to stay execution of sentence and motion to modify sentence and place defendant on probation, with [fols. 21-22] suggestions in support thereof filed. (File to Judge Duncan)

Nov. 12. Motion of defendant to stay execution of sentence etc., is argued submitted to the Court and by the Court taken under advisement.

1954

Nov. 18. Memorandum and order, overruling motion to stay execution of sentence and motion to modify sentence and placed defendant on probation, filed. (Copy to Harry F. Murphy, counsel for the defendant; copy to U. S. Attorney; copy to the Attorney General)

Nov. 19. Notice of Appeal from said ruling filed. Duplicate thereof and two certified copies of the docket entries mailed to the Clerk of U. S. Court of Appeals, St. Louis, Missouri.

[Clerk's Certificate to foregoing paper omitted in printing.]

[fol. 23] In United States Court of Appeals for the Eighth Circuit

No. 15,220

Lonnie Affronti, Appellant,

vs.

United States of America, Appellee

Appeal from the United States District Court for the Western District of Missouri

Opinion—April 13, 1955

Harry F. Murphy filed brief for Appellant.

Edward L. Scheufler, United States Attorney, and Kenneth C. West, Assistant United States Attorney, filed brief for Appellee.

Before Sanborn, Collet and Van Oosterhout, Circuit Judges

Sanborn, Circuit Judge:

The United States District Court for the Western District of Missouri on January 26, 1944, upon the verdict of [fol. 24] a jury finding the appellant guilty upon nine counts of a ten-count indictment charging illegal sales of narcotics, entered a judgment sentencing him to five years imprisonment under each of the nine counts, the sentences to be served consecutively. The judgment provided that he was to serve four of the five-year periods of imprisonment commencing after the termination of a sentence he was then serving in the Missouri State Penitentiary. The execution of the sentences imposed by the judgment under five of the nine counts of the indictment was suspended, and as to those sentences the appellant was placed on probation for the period of twenty-five years, the probation to commence after he had served the sentences execution of which was not suspended. He appealed from this judgment, which was affirmed by this Court in October of 1944. 145 F.2d 3.

The appellant was, on October 13, 1949, released from the Missouri State Penitentiary and transferred to the

United States Penitentiary at Leavenworth, Kansas, in execution of the judgment of the federal District Court, and has been in federal executive custody ever since.

In July of 1953 the appellant filed a motion in the District Court, stating that the service of the first of the five-year sentences or periods of imprisonment he was required to serve would soon be completed and asking that the execution of the remaining unserved sentences or periods of imprisonment be suspended, and that he be placed on probation.

The judge who had sentenced the appellant was no longer a member of the District Court. The motion was heard by Chief Judge Duncan of that court. In denying the motion, he said:

[fol. 25] "In his motion the defendant contends that unless he is placed on probation for the remainder of the sentences imposed by this court, that he will not be eligible for release until November 26, 1962; further that his prison record is without blemish; that the interests of society have been served by the long period of confinement which has been imposed upon him, and that the best interests of justice will be served by placing him on probation for the remainder of the term of his sentences.

"It had been the custom of this court until *Phillips* v. *United States*, 8 Cir., 212 F. 2d 327 (decided May 4, 1954), in instances where, in the opinion of the court the best interests of justice would be served, to suspend the execution of a sentence, the service of which had not yet begun and place the defendant on probation for the remainder of such term, notwithstanding the fact that such defendant had begun the service of a sentence on a prior count imposed at the same term as the sentence which was later suspended.

"Before the decision in *Phillips* v. *United States*, *supra*, apparently the courts in the Ninth and Tenth circuits had determined that such action was within the right of the court, but of course, the opinion in the *Phillips* case is binding upon this court. *Kirk* v. *United States*, 9 Cir., 185 F. 2d 185; *White* v. *Steigleder*, 10 Cir., 37 F. 2d 858."

We are now urged by counsel for appellant to overrule our decision in *Phillips* v. *United States*, 212 F. 2d 327,

and to follow the opinion of the Court of Appeals for the Ninth Circuit in *Kirk* v. *United States*, 185 F. 2d 185, which was relied upon in *Kelley* v. *United States*, 10 Cir., 209 F. 2d 638, and which he assures us correctly states the applicable law. While we regret that the *Phillips* case did not reach the Supreme Court on certiorari, nothing has been brought forward by the appellant which tends in any way to indicate that this Court's decision in the *Phillips* case was incorrect.

[fol. 26] As strongly indicating that the *Phillips* case was correctly decided, we note that Judge Chestnut, of the United States District Court for the District of Maryland, recently in two cases gave careful consideration to the question of the power of a District Court to grant a federal prisoner probation with respect to unserved portions of a cumulative sentence which was being served, *United States* v. *Stern*, 123 F. Supp. 118, 125, and *United States* v. *Bernett* (*United States* v. *Mann*), 123 F. Supp. 841, 844-847, and reached the same conclusion that was reached by this Court in the *Phillips* case,—declining, as this Court did, to follow the decision of the Ninth Circuit in the *Kirk* case. An appeal was taken to the Court of Appeals for the Fourth Circuit in each of the cases decided by Judge Chestnut, and his decisions were affirmed. *Stern* v. *United States*, 4 Cir., F. 2d , opinion filed February 2, 1955, and *Mann* v. *United States*, 4 Cir., 218 F. 2d 936.

The decision of this Court in the *Phillips* case is adhered to. It calls for the affirmance of the order appealed from.

The appellant may apply to the Supreme Court for certiorari without prepayment of further Clerk's fees or costs in this Court.

The order appealed from is affirmed.

Collet, Circuit Judge, dissents for the reasons stated by him in his dissenting opinion in the case of *Phillips* v. *United States*, 212 F. 2d 327, 336.

[fols. 27-28] IN UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 15220

LONNIE AFFRONTI, Appellant,

vs.

UNITED STATES OF AMERICA

Appeal from the United States District Court for the Western District of Missouri

JUDGMENT—April 13th, 1955

This cause came on to be heard on the record from the United States District Court for the Western District of Missouri, and on the briefs filed by counsel for the respective parties.

On Consideration Whereof, It is now here Ordered and Adjudged by this Court that the Order of the said District Court appealed from in this cause be, and the same is hereby, affirmed.

[fols. 29-30] IN UNITED COURT OF APPEALS FOR THE EIGHTH CIRCUIT

[Title omitted]

ORDER RE PREPARATION OF RECORD AND STAYING ISSUANCE OF MANDATE—April 25, 1955

In the opinion of this Court filed April 13, 1955, it was provided that the defendant-appellant may apply to the Supreme Court of the United States for certiorari without prepayment of further Clerk's fees or costs in this Court, and it having been determined by counsel representing appellant to make such application. It is Ordered by this Court that the necessary record be prepared for filing in the Supreme Court with a petition for writ of certiorari without payment of fee therefore to the Clerk of this Court.

And it is further Ordered by this Court, on motion of counsel for appellant, that the issuance of the mandate in

this cause be, and it is hereby, stayed to and including May 20, 1955, and if petition for writ of certiorari is filed within thirty days from and after the date of the judgment of this Court, April 13, 1955, the mandate will then be held until final disposition of the case in the Supreme Court.

April 25, 1955.

[fols. 31-32] [Clerk's Certificate to foregoing transcript omitted in printing.]

[fol. 33] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1954

No. 790

[Title omitted]

ORDER ALLOWING CERTIORARI—Filed June 6, 1955

The petition herein for a writ of certiorari to the United States Court of Appeals for the Eighth Circuit is granted, and the case is transferred to the summary calendar.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

(2940-5)